(8)

No. 97-1868

Supreme Court, U.S.
FILED
DEC 2 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

Of Counsel:
BARBARA H. FUREY
Assistant General Counsel
BRIAN G. KANNER
Senior Litigation Counsel
TAMARRA T. RENNICK
Litigation Counsel
UNUM LIFE INSURANCE COMPANY OF AMERICA
2211 Congress Street
Portland, ME 04122
(207) 770-2211

LESLEY C. GREEN
RUSSELL G. PETTI
BANNAN, GREEN & FRANK LLP
555 South Flower Street
44th Floor
Los Angeles, CA 90017
(213) 362-1177

DAVID L. BACON
Counsel of Record
BENJAMIN I. DELANCY
CHARLES M. DYKE
THELEN REID & PRIEST LLP
333 So. Grand Avenue
34th Floor
Los Angeles, CA 90071
(213) 621-9800
Attorneys for Petitioner UNUM Life Insurance Company of America

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60PP

QUESTIONS PRESENTED

1. Whether, in an opinion expressly acknowledging a circuit conflict—indeed, one affecting eight circuits—the Ninth Circuit erred in holding that a state law (the "notice-prejudice" rule) need not satisfy all three McCarran-Ferguson Act criteria for the "business of insurance" in order to be saved from preemption under ERISA.

2. Whether the Ninth Circuit—contrary to the law in nine other circuits—erred in holding that a state law survives ERISA preemption even though it conflicts not only with ERISA's requirement that fiduciaries administer all plans "in accordance with" their written terms, but also with ERISA's exclusive civil enforcement scheme by expanding the remedies beyond those expressly provided for in the Act.

3. Whether—also contrary to the law in other circuits—the Ninth Circuit erred in holding that ERISA does not preempt a state law (one incorporating agency principles) even though it conflicts not only with ERISA's regulation of initial claims filing and processing and its allocation of fiduciary responsibility, but also with the remedies provided in its exclusive civil enforcement scheme.

PARTIES

The petitioner is UNUM Life Insurance Company of America ("UNUM"). The respondent is John E. Ward.

Pursuant to Rule 29.6 of the Rules of the Supreme Court, petitioner states that UNUM Corporation is the parent of UNUM. UNUM Corporation has two non-wholly owned subsidiaries, Boston Compania Argentina de Seguros S.A. and UNUM Delaware Company. UNUM Life Insurance Company of America has one non-wholly owned subsidiary, SP Administrator, LLC.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. Factual Background	2
B. The District Court Proceeding	5
C. The Ninth Circuit Decision	6
SUMMARY OF ARGUMENT	8
ARGUMENT	12
THE NINTH CIRCUIT DECISION IS INCOMPATIBLE WITH ERISA'S STATUTORY DESIGN AND PREEMPTION OF STATE LAWS AND, UNLESS REVERSED, WILL SERIOUSLY DISRUPT THE STATUTORY SCHEME	12
I. Congress Designed ERISA To Provide Uniform Federal Regulation For The Administration Of All Plans, Self-Funded And Insured Alike	12
II. The Ninth Circuit Saving Clause Holding Squarely Conflicts With ERISA	22
A. General Common-Law Rules Do Not Constitute Regulation Of The "Business Of Insurance" Under The McCarran-Ferguson Act, Upon Which ERISA's Saving Clause Is Based	22

TABLE OF CONTENTS—Continued

	Page
1. The Notice-Prejudice Rule Admittedly Does Not Involve The Transfer of Risk, An Essential McCarran-Ferguson Requirement	23
2. Nor Does The Notice-Prejudice Rule Satisfy The Other Two Essential McCarran-Ferguson Criteria	27
B. Even If Otherwise Applicable, The Saving Clause Would Not Shield State Laws Directly Conflicting With ERISA's Statutory Provisions Or Objectives, Including Its Exclusive Civil Enforcement Scheme	32
C. Additionally, ERISA And McCarran-Ferguson Would Bar Any State Laws Directly Impacting An ERISA Fiduciary's Claims-Handling For An Insured Plan	36
III. The Ninth Circuit Preemption Clause Holding Squarely Conflicts With ERISA	39
A. *Elfstrom* Is A Pre-ERISA Attempt By The California Supreme Court To Regulate The Administration Of Employee Benefit Plans	39
B. The *Elfstrom* Rule Plainly Relates To An ERISA Plan	40
C. The *Elfstrom* Rule Directly Conflicts With ERISA's Substantive Terms Governing Plan Administration	42
D. The *Elfstrom* Rule Directly Clashes With ERISA's Exclusive Civil Enforcement Mechanism	45
IV. Unless Reversed, The Ninth Circuit Decision Will Seriously Disrupt The Administration Of The Nation's Employee Benefit Plan System	45
CONCLUSION	50

TABLE OF AUTHORITIES

CASES	Page
Aetna Cas. and Surety Co. v. Murphy, 206 Conn. 409, 538 A.2d 219 (1988)	27
Alessi v. Raybestos Manhattan Inc., 451 U.S. 504 (1981)	17
Anderson v. Humana, Inc., 24 F.3d 889 (7th Cir. 1994)	25
Anschultz v. Connecticut General Life Ins. Co., 850 F.2d 1467 (11th Cir. 1988)	27
Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996)	25
Belasco v. W.K.P. Wilson & Sons, Inc., 833 F.2d 277 (11th Cir. 1987)	14
Boggs v. Boggs, 117 S.Ct. 1754 (1997)	11, 12, 18, 22
Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176 (7th Cir. 1993)	35
Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150 (8th Cir. 1990)	26
Burnham v. Guardian Life Ins. Co., 873 F.2d 486 (1st Cir. 1989)	34
Campbell v. Allstate Ins. Co., 60 Cal.2d 303 (1963)	28
California Div. of Labor Standards Enforcement v. Dillingham Constr., 117 S.Ct. 832 (1997)	9, 39
Central States, Southeast and Southwest Areas Pension Fund v. Mississippi Warehouse Corp., 853 F. Supp. 1053 (N.D. Ill. 1994)	35
Christie v. K-Mart Corp. Employees Retirement Pension Plan, 784 F. Supp. 796 (D. Kan. 1992)	35
CIGNA Healthplan v. Louisiana, 82 F.3d 642 (5th Cir.), *cert. denied*, 117 S.Ct. 387 (1996)	7, 26
Cisneros v. UNUM Life Ins. Co. of America, 134 F.3d 939 (9th Cir. 1998)	4, 6, 7, 11, 23, 32
Coleman v. Nationwide Life Ins. Co., 969 F.2d 54 (4th Cir. 1992)	34
Conservatorship of Rand, 49 Cal.App.4th 835 (1996)	28
Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995)	13, 14

TABLE OF AUTHORITIES—Continued

	Page
Davies v. Centennial Life Ins. Co., 128 F.3d 934 (6th Cir. 1997)	27, 29
Davison v. Cook, 564 F. Supp. 225 (E.D. Va. 1983), *aff'd mem.*, 734 F.2d 10 (4th Cir. 1984)	43
DeBruyne v. Equitable Life Assurance Soc., 920 F.2d 457 (7th Cir. 1990)	27
Dedeaux v. Pilot Life Ins. Co., 770 F.2d 1311 (5th Cir. 1985), *reversed*, 481 U.S. 41 (1987)	8, 39
Delgado v. Heritage Life Ins. Co., 157 Cal.App.3d 262 (1984)	47
Department of Treasury v. Fabe, 508 U.S. 491 (1993)	26
District of Columbia v. The Greater Washington Bd. of Trade, 506 U.S. 125 (1992)	41
Doe v. Blue Cross & Blue Shield United, 112 F.3d 869 (7th Cir. 1997)	34
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)	41
Edwards v. Great-West Life Assur. Co., 20 F.3d 748 (7th Cir. 1994)	34
Eley v. Boeing Co., 945 F.2d 276 (9th Cir. 1991)	14
Elfstrom v. New York Life Ins. Co., 67 Cal.2d 503 (1967)	5, 39, 45
FMC Corp. v. Holliday, 498 U.S. 52 (1990)	18, 41, 49
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987)	12
Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205 (1979)	6, 10, 23, 24, 25, 26
Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)	29
Health v. Varity Corp., 71 F.3d 256 (7th Cir. 1995)	48
Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.)	38
Hogan v. Kraft Foods, 969 F.2d 142 (5th Cir. 1992)	17
Holland v. Burlington Indus., Inc., 772 F.2d 1140 (4th Cir. 1985)	17

TABLE OF AUTHORITIES—Continued

	Page
Howard v. Gleason Corp., 910 F.2d 1154 (2d Cir. 1990)	34, 42
Hozier v. Midwest Fasteners Inc., 908 F.2d 1155 (3rd Cir. 1990)	14
Hunt v. Hawthorne Associates, Inc., 119 F.3d 888 (11th Cir. 1997)	13
Industrial Asphalt v. Garrett Corp., 180 Cal.App. 3d 1001 (1986)	28
Ingersoll-Rand Co. v. McLendon, 498 U.S. 133 (1990)	9, 18, 39, 41, 45
Insurance Bd. v. Muir, 819 F.2d 408 (3d Cir. 1987)	26
Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482 (7th Cir. 1996)	41, 42, 45
John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank, 510 U.S. 86 (1993)	10, 32, 38
Justice v. Bankers Trust Co., Inc., 607 F. Supp. 527 (D.C. Ala. 1985)	44
Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989)	17
Kelley v. Sears, Roebuck & Co., 882 F.2d 453 (10th Cir. 1989)	27
Kennedy v. System One Holdings, Inc., 835 F. Supp. 947 (S.D. Tex. 1993)	35
Kinkead v. Southwestern Bell Sick. & Acci. Corp. Disability Benefit Plan, 111 F.3d 67 (8th Cir. 1997)	35
Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985)	13, 19, 36, 43, 44
McMahan v. New England Mut. Life Ins. Co., 888 F.2d 426 (6th Cir. 1989)	27
Member Services Life Ins. Co. v. American Nat. Bank and Trust Co. of Sapula, 130 F.3d 950 (10th Cir. 1997)	21, 34
Mertens v. Hewitt Associates, 508 U.S. 248 (1993)	9, 12
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	6, 7, 22, 26, 30, 31

TABLE OF AUTHORITIES—Continued

	Page
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	33
McKinsey v. Sentry Ins. Co., 986 F.2d 401 (10th Cir. 1993)	44
Moran v. Aetna Life Ins. Co., 872 F.2d 296 (9th Cir. 1989)	44
Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922 (9th Cir. 1986)	21
Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986)	34
National Conf. of Blue Cross-Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)	9, 11, 13, 17, 22, 33, 36, 41, 47
Nazay v. Miller, 949 F.2d 1323 (3d Cir. 1991)	34
NLRB v. Amax Coal Co., 453 U.S. 322 (1981)	19
Northeast Department ILGWU v. Teamsters Local No. 294, 764 F.2d 147 (3d Cir. 1985)	34
O'Connor v. UNUM Life Ins. Co. of America, 146 F.3d 959 (D.C. Cir. 1998)	34, 38
Pacificare Inc. v. Martin, 34 F.3d 834 (9th Cir. 1994)	21
Perkins v. Time Ins. Co., 898 F.2d 470 (5th Cir. 1990)	43
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	6, 8, 10, 12, 14, 16, 17, 20, 22, 30, 41, 47, 49
Pohl v. National Benefits Consultants, Inc., 956 F.2d 126 (7th Cir. 1992)	33, 34
Powell v. Chesapeake & Potomac Telephone Co., 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986)	29
Roe v. General American Life Ins. Co., 712 F.2d 450 (10th Cir. 1983)	14
Sarchett v. Blue Cross of Calif., 43 Cal.3d 1 (1987)	47
SEC v. National Securities, Inc., 393 U.S. 453 (1969)	26
Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)	13

TABLE OF AUTHORITIES—Continued

	Page
Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562 (11th Cir.), *cert. denied*, 513 U.S. 803 (1994)	10, 28, 34
Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles County, 17 Cal.3d 491 (1976)	28
Sofo v. Pan-American Life Ins. Co., 13 F.3d 239 (7th Cir. 1994)	17
Taylor v. Bakery & Confectionery Union & Industry International Welfare Fund, 455 F. Supp. 816 (E.D.N.C. 1978)	46
Tiger v. AT&T Tech. Plan for Employees' Pensions, Disability Plan, 633 F. Supp. 532 (E.D. N.Y. 1986)	35
Tingle v. Pacific Mut. Ins. Co., 996 F.2d 105 (5th Cir. 1993)	7, 26
Turrill v. Life Ins. Co. of North America, 753 F.2d 1322 (5th Cir. 1985)	8, 39
Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982)	24, 25
Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751 (1942)	28
Vaca v. Sipes, 386 U.S. 171 (1967)	35
Varsic v. United States Dist. Ct., 607 F.2d 245 (9th Cir. 1979)	48
Varity Corp. v. Howe, 516 U.S. 489 (1996)	44
Wadsworth v. Whaland, 562 F.2d 70 (1st Cir. 1997)	19
Willden v. Washington Nat'l Ins. Co., 18 Cal.3d 631 (1976)	47

STATUTES AND REGULATIONS

15 U.S.C. § 1012(a)	22
15 U.S.C. § 1012(b)	23, 31, 38
28 U.S.C. § 1254(1)	2
29 U.S.C. § 1001(a), (b)	8
29 U.S.C. § 1002(1), (2), (3)	15, 46
29 U.S.C. § 1002(16)(A), (B)	2, 43
29 U.S.C. § 1022(b)	15

TABLE OF AUTHORITIES—Continued

	Page
29 U.S.C § 1023(a) (2)	15
29 U.S.C. § 1101(b) (2)	15
29 U.S.C. § 1102(a) (1), (b) (2)	9, 13, 43
29 U.S.C. § 1102(b) (3)	13
29 U.S.C. § 1104(a) (1) (D)	9, 13, 20, 21, 37, 38, 45
29 U.S.C. § 1105(a) (1), (3)	43, 44
29 U.S.C. § 1105(b) (1)	44
29 U.S.C. § 1109(a)	14, 43
29 U.S.C. § 1131	20
29 U.S.C. § 1132(a)	15
29 U.S.C. § 1132(a) (1) (A)	13
29 U.S.C. § 1132(a) (1) (B)	13, 35, 45
29 U.S.C. § 1132(a) (2)	14
29 U.S.C. § 1132(a) (3)	14
29 U.S.C. § 1132(e) (1)	15
29 U.S.C. § 1132(g) (1)	20
29 U.S.C. § 1133	2, 13, 15, 19, 37
29 U.S.C. § 1141	20
29 U.S.C. § 1144(a)	6, 10, 16
29 U.S.C. § 1144(b) (2) (A)	6, 10, 22
29 U.S.C. § 1144(b) (2) (B)	37
29 U.S.C. § 1144(d)	37
29 C.F.R. § 2560.503-1(b), (c)-(g)	15, 19, 20, 35

OTHER AUTHORITIES

David L. Bacon, et al., *Employee Benefits Guide* (Matthew Bender & Co.) (1997), § 8.02[1]	23
13A George J. Couch, *Couch Cyclopedia of Insurance Law* § 49.49	49
Legislative History of the Employee Retirement Income Security Act	15, 16
Restatement (2d) of Contracts, § 205	27
Restatement (2d) of Contracts, § 229	28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1868

UNUM LIFE INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

JOHN E. WARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 135 F.3d 1276 (9th Cir. 1998), and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a-25a. The District Court opinion granting summary judgment to the Management Analysis Company Employee Disability Benefit Plan and UNUM (Pet. App. 2a and 27a-33a) is unreported.

JURISDICTION

The Court of Appeals' order denying UNUM's petition for rehearing, with a suggestion for rehearing en banc, was entered on March 23, 1998. Pet. App. at 26a. Petitioner filed a timely Petition for a Writ of Certiorari on May 20, 1998, and the petition was granted by Order of

this Court dated October 13, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the federal statutes and regulations set forth in the Appendix to the Petition for a Writ of Certiorari at 99a-108a.

STATEMENT OF THE CASE

A. Factual Background

In February of 1983, UNUM Life Insurance Company of America ("UNUM") issued a group long-term disability insurance policy to fund an employee welfare benefit plan (the "Plan") sponsored by Management Analysis Company ("MAC"), an employer with multi-state operations. Pet. App. at 59a, 47a. Respondent John Ward worked for MAC in California, serving as its President and Chief Executive Officer ("CEO"). Pet. App. at 2a, 78a, 83a-86a. The Plan is covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001, *et seq.* Pet. App. at 2a. In establishing the Plan, the employer was the Plan Sponsor and chose to serve as Plan Administrator.[1] As allowed by ERISA § 3(1), the employer funded the Plan by purchasing a group disability policy from UNUM and delegated to UNUM the responsibility for administering benefit claims and conducting the ERISA fiduciary review procedure for denied claims required by § 503. 29 U.S.C. §§ 1002(1), 1133. Pet. App. at 39a. The Plan expressly provided that the employer served as Plan Administrator and acted on its own behalf or as an agent for its employees, and not as UNUM's agent. Pet. App. at 44a.

A participant in the Plan since its inception in 1983, Ward admitted that he was aware of the Plan and had

[1] Pet. App. at 13a; ERISA § 3(16)(A), (B), 29 U.S.C. § 1002(16)(A), (B).

received from MAC in 1983 a certificate of coverage containing the Plan's summary plan description. Pet. App. at 2a. This certificate described the Plan's benefits and requirements for eligibility and participation, as well as the procedures and deadlines Ward must follow in submitting claims to UNUM. Pet. App. at 41a-43a. As CEO, Ward met annually with the company's human resources division to review all of MAC's insurance plans, including this Plan. Five months before his resignation in 1992, Ward attended a meeting at which a UNUM representative presented a summary of the Plan's benefits. Pet. App. at 32a-33a.

Ward served as President and CEO of MAC until May 8, 1992, when he resigned upon the Board of Directors' request over financial concerns about a particular company project. Pet. App. at 27a. Ward claims that by December of 1992 he had received a diagnosis of diabetes. In early 1993, he received state disability benefits, and alleges that he contacted MAC's human resources division to discuss extension of his COBRA continuation insurance. In July of 1993, he received a determination that he was eligible for Social Security benefits, a copy of which he sent to the human resources division. Pet. App. at 28a.

Ward, however, did not submit a claim for plan benefits until April, 1994, nearly two years after the onset of his claimed disability. Ward asserted that his disability began on May 5, 1992, while he was still employed by MAC. Coincidentally, this was the same day that the Board of Directors asked Ward to resign. UNUM received Ward's notice and proof of claim form on April 11, 1994. This was UNUM's first actual notice of the claimed disability. Pet. App. at 38a.

The Plan's written notice and proof of claim provisions are unambiguous and lawful under ERISA. Pet.

App. at 5a.[2] They require a participant to submit a written notice of claim for plan benefits to UNUM within 30 days of the date disability starts, if possible, and a written proof of claim, at the latest, one year and 180 days after the onset of disability. Pet. App. at 42a-43a. Ward's notice of claim was untimely by nearly 15 months, and his written proof of claim was submitted nearly five months after the Plan's last deadline. Pet. App. at 5a. Accordingly, no benefits were "due" under the Plan's written terms.

Despite Ward's annual review of MAC's insurance plans, he asserted that he did not know about the "availability" of the Plan until April of 1994, when he claims he discovered his certificate of coverage among papers in his safety deposit box. Pet. App. at 3a. Further, he contended that MAC should be considered the "agent" of UNUM notwithstanding that MAC was the Plan Administrator, and the Plan expressly stated that MAC was not UNUM's agent. Additionally, he contended that MAC purportedly knew he was "disabled" by 1992 or 1993, and that this claimed knowledge should not only be imputed to UNUM but also free him from the Plan's requirements of timely written notice and proof of claim to UNUM. Pet. App. at 96a-98a.

After reviewing Ward's claim for plan benefits and supporting materials, UNUM determined that he was ineligible because he did not submit his written claim within the Plan's written time limits. UNUM notified him of its decision in April of 1994; he, in turn, requested a review. After completing the ERISA-required fiduciary review procedure for denied claims, UNUM upheld the decision to deny plan benefits based on the Plan's written terms. Pet. App. at 96a-98a.

---

[2] *See also Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939, 943 (9th Cir. 1998), petition for writ of certiorari filed, Case No. 97-1867.

B. The District Court Proceeding

On September 15, 1995, Ward filed suit against the Plan and UNUM in United States District Court for the Southern District of California to recover plan benefits under ERISA. Pet. App. at 77a-98a. He did not assert a claim against MAC.

On August 8, 1995, the District Court granted the Plan and UNUM summary judgment pursuant to ERISA. Pet. App. at 2a-27a to 33a. It held that the Plan's written proof of claim provision required that proof of claim be filed with UNUM in writing within one year and 180 days after the onset of disability, and that Ward had failed to comply with this provision. Additionally, it rejected Ward's arguments that California's common-law *Elfstrom* rule[3] survived ERISA preemption and governed the payment of plan benefits. Pet. App. at 30a-33a. In that pre-ERISA case, an employer which performed administrative tasks under an insured welfare plan was held to have been the agent of the insurer, and the employer's knowledge was imputed to the insurer. The *Elfstrom* rule, if applicable, would make MAC the "agent" of UNUM, imputing to UNUM any knowledge the employer had of Ward's disability and, in his view, requiring the Plan to pay benefits regardless of the fact that payment was barred by its written terms. Ward appealed.

C. The Ninth Circuit Decision

On appeal of the summary judgment granted to the Plan and UNUM, the Ninth Circuit reversed the District Court's decision on two grounds: California's notice-prejudice rule and the *Elfstrom* rule.

The Ninth Circuit agreed that Ward had failed to satisfy the Plan's unambiguous written proof of claim provision. It then addressed Ward's argument that the

---

[3] The rule takes its name from *Elfstrom v. New York Life Ins. Co.*, 67 Cal.2d 503, 505 (1967).

common-law notice-prejudice rule should be applied to require the Plan to pay benefits, and to preclude UNUM, the claims review fiduciary, from upholding the denial unless it could establish "actual prejudice" from the failure to comply with the proof of claim provision. The Ninth Circuit necessarily held that California's notice-prejudice rule fell within the scope of ERISA's preemption clause as a state law which "relates to" an employee benefit plan. Pet. App. at 5a. ERISA § 514(a), 29 U.S.C. § 1144(a). It then held, however, that the rule was preserved by ERISA's insurance saving clause. ERISA § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). In so doing, it followed its earlier, companion decision in *Cisneros v. UNUM Life Ins. Co. of America*, 134 F.3d 939 (9th Cir. 1998) ("*Cisneros*"), Pet. App. at 5a-6a, petition for writ of certiorari filed, Case No. 97-1867.

In *Cisneros*, the Ninth Circuit had concluded that under *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 744 (1985), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-50 (1987), ERISA's saving clause applies if the state law clears two hurdles: a common-sense test that the law be "specifically directed" at the insurance industry, and the saving clause requirement that the law must "regulate insurance." 134 F.3d at 944-945. To determine whether the notice-prejudice rule regulates insurance, the *Cisneros* Court analyzed whether the ERISA claims processing procedures that the rule attempts to regulate satisfy the three criteria established by this Court for determining what constitutes the "*business of insurance*" under the McCarran-Ferguson Act, 15 U.S.C. § 1012. *Id.* at 945. Under these criteria, the regulated practice first must have the effect of transferring or spreading the policyholder's risk of loss to the insurer, "an indispensable characteristic of insurance." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211-212 (1979). Second, the practice must be an integral part of the insurance policy relationship between insurer and

insured, such as regulation of the "*substantive content* of insurance contracts." *Metropolitan Life*, 471 U.S. at 742 n.18 (emphasis added). Third, it must be limited to entities within the insurance industry. *Id.* at 743, *Pilot Life*, 481 U.S. at 48-50.

In *Cisneros*, the Ninth Circuit correctly found that the practice of claims processing at which California's notice-prejudice rule is directed did *not* transfer or spread the policyholder's risk of loss to the insurer, and thus failed to satisfy the first McCarran-Ferguson criterion. 134 F.3d at 945-946. It concluded, however, that the notice-prejudice rule was "saved" because it satisfied the last two criteria. *Id.* Expressly acknowledging that its holding conflicted with two Fifth Circuit decisions, *CIGNA Healthplan v. Louisiana*, 82 F.3d 642, 650 (5th Cir.), *cert. denied*, 117 S.Ct. 387 (1996), and *Tingle v. Pacific Mut. Ins. Co.*, 996 F.2d 105, 108 (5th Cir. 1993), it stated: "We recognize that the Fifth Circuit has held that all three of the McCarran-Ferguson factors must be satisfied . . . . We . . . disagree." 134 F.3d at 946.

The Ninth Circuit also acknowledged a direct conflict between the notice-prejudice rule and ERISA, conceding that the rule caused "*a plan's written terms* [*to be*] *altered,*" caused "*complications and extra burdens*" on plan administration, and made the plan "*more difficult to administer.*" Further, it acknowledged that the rule had been adopted in only approximately half the states and, even in those states, the rule "*differ*[*ed*] *markedly.*" 134 F.3d at 945-947 (emphasis added).

The *Ward* Court followed *Cisneros*' holding that the notice-prejudice rule was saved and then held that ERISA did not preempt California's common-law *Elfstrom* rule under which an employer, as administrator of a group insurance plan, is deemed the agent of the insurer and its knowledge is imputed to the insurer. Like the notice-prejudice rule, the *Elfstrom* rule would require the pay-

ment of benefits contrary to the Plan's written terms. The Ninth Circuit nevertheless held that the rule did not "relate to" an ERISA plan within the meaning of § 514(a). It based this extraordinary holding on *Turrill v. Life Ins. Co. of North America*, 753 F.2d 1322 (5th Cir. 1985), a decision *preceding* this Court's 1987 unanimous decision in *Pilot Life, supra*, which held that ERISA preempts a participant's state common-law causes of action based on a failure to pay benefits under an insured ERISA plan. Pet. App. at 16a-20a. The Ninth Circuit inferred that *Turrill*, a 1985 diversity case, supported a holding of no ERISA preemption because the Fifth Circuit had discussed state law agency theory without, as the Ninth Circuit put it, "even hint[ing] that state agency law is somehow preempted by ERISA." Pet. App. at 18a. This is hardly surprising given that prior to *Pilot Life*, the lower courts including the Fifth Circuit uniformly but incorrectly held that ERISA did *not* preempt such claims. *See, e.g., Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985), *reversed*, 481 U.S. 41 (1987). The Ninth Circuit relied on this impliedly overruled and discredited Fifth Circuit authority in *Turrill* in adopting state agency law and applying the *Elfstrom* rule.

SUMMARY OF ARGUMENT

At stake in this controversy is the continued supremacy of federal law in the important areas of ERISA fiduciary standards, plan administration and civil enforcement. Congress designed ERISA to encourage the growth and development of a purely voluntary, financially stable system of employee benefit plans, ones with an "increasingly interstate" "operational scope and impact." ERISA § 2(a), (b), 29 U.S.C. § 1001(a), (b). ERISA accomplishes this goal by providing an exclusive, uniform system of *federal* regulation for both self-funded and insured plans, including "standards of conduct, responsibility, and obligation for fiduciaries," and "appropriate remedies, sanctions, and ready access to the Federal courts." *Id.* ERISA

is " 'an enormously complex and detailed statute' that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Associates*, 508 U.S. 248, 251, 262 (1993) (citation omitted).

Among Congress' principal objectives in drafting ERISA was the elimination of the conflicting system of federal, state and local regulation then governing the administration of employee benefit plans. To ensure federal uniformity of law, Congress enacted a broad array of national, uniform fiduciary standards which require that all plans be "established and maintained pursuant to a written instrument," and be administered strictly "in accordance with" the plan's written terms. ERISA §§ 402(a)(1), 404(a)(1)(D), 29 U.S.C. §§ 1102(a)(1), 1104(a)(1)(D). Consistent with this "written plan instrument" rule, Congress enacted exclusive civil enforcement provisions which strictly limit a participant to suits for benefits "due" under the plan's written terms. ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). The "potential for conflict in substantive law" is "*[p]articularly disruptive*" under ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990) (emphasis added). To secure the preeminence of federal law, Congress added a "clearly expansive" preemption clause in ERISA § 514(a) in order to permit the "*nationally uniform administration*" of all plans, self-funded and insured alike. *National Conf. of Blue Cross-Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 657 (1995) (emphasis added) ("*Travelers*").

The Ninth Circuit ignored this background and engaged in an unprecedented reformulation of ERISA preemption standards even after the pronouncements of *Travelers* and *California Div. of Labor Standards Enforcement v. Dillingham Constr.*, 117 S.Ct. 832, 842 (1997) ("*Dillingham*"). By engaging in unprincipled line-drawing, the Ninth Circuit decision threatens to undermine ERISA's carefully-crafted statutory scheme by expanding the saving clause ex-

ception to preemption far beyond the narrowly-drawn parameters established by Congress. ERISA § 514(b)(2)(A). California's notice-prejudice rule fails to satisfy the common-sense test for insurance regulation, and all three of the McCarran-Ferguson Act criteria for regulation of the "business of insurance." First, the rule does not regulate a practice that transfers the risk of loss, "an indispensable characteristic of insurance," *Royal Drug Co.*, 440 U.S. at 211-212, and on that ground alone the rule is outside the saving clause's protection. Second, it only purports to "regulate[] the *administration* of policies, not their substantive terms." *See Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 570 (11th Cir.), *cert. denied*, 513 U.S. 803 (1994) (emphasis added). Third, it derives from general principles of contract law applicable to all California contracts, and thus is not limited to the insurance industry. Furthermore, even if the saving clause somehow were deemed applicable, ERISA would preempt the rule because it conflicts with a number of the Act's key provisions and frustrates its purposes, including the exclusivity of its civil enforcement scheme. *Pilot Life*, 481 U.S. at 51-57; *see John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86, 99 n.9 (1993) ("no decision of this Court has applied the savings clause to supersede a provision of ERISA itself").

At the same time that it vastly expands the saving clause, the Ninth Circuit decision contracts the scope of ERISA's preemption clause to a virtual nil. ERISA § 514(a). The Circuit court held that a plan participant's attempt to obtain plan benefits through the use of a state common-law agency rule, such as *Elfstrom*, falls outside of ERISA preemption because, in the court's view, it simply has no "connection with" a plan and does not provide an alternate enforcement mechanism. This astounding holding effectively reads § 514(a) out of ERISA. It creates a new "preemption" standard which will have an extreme impact not only on suits for benefits

but also on the *entire* administration of insured and self-funded plans, exposing each to federal-state conflict and to fifty different sets of state laws.

The Ninth Circuit decision thus generates, in two important respects, a "*direct clash* between state law and the provisions and objectives of ERISA," one where preemption necessarily arises because " 'compliance with both federal and state regulations is a *physical impossibility*.' " *Boggs v Boggs*, 117 S.Ct. 1754, 1762 (1997) (citation omitted) (emphasis added). The Circuit court openly acknowledged the direct conflict between California's notice-prejudice rule and ERISA, stating that the rule made the plan "*more difficult to administer*" and caused "a plan's written terms [to be] *altered*." *Cisneros*, 134 F.3d at 947 (emphasis added). In the same manner, *Elfstrom* requires the payment of benefits by an interstate employer's plan under circumstances where the plan itself and ERISA's statutory scheme would require a claim denial. The practical effect of the decision will be to wholly supplant ERISA's insistence that plan administration center on the "written plan instrument," in direct contravention of Congress' intent to render plan regulation and civil enforcement " '*exclusively a federal concern*.' " *Pilot Life*, 481 U.S. at 45-46 (citation omitted) (emphasis added).

The Ninth Circuit's decision, moreover, will only spur additional litigation as participants across the country strive to pick and choose from a diverse menu of state law theories instead of pursuing their federal rights under ERISA. If one or two judicial revisions of ERISA's text governing fiduciary duties and civil enforcement are appropriate, through artful but erroneous readings of the preemption and saving clauses, plaintiffs and the lower courts will ask, why not twenty? If twenty, why not two hundred? This departure from the predictable, "uniform" structure of federal regulation decreed by ERISA, *Travelers*, 514 U.S. at 656-657, the resulting disturbance in plan administration and the increased litigation and transaction costs will only lead plan sponsors to a reduction or elim-

ination of benefits, *Fort Halifax Packing Co. v. Coyne*, 482 U.S 1, 13 (1987), all in conflict with the "public interest in encouraging the *formation* of employee benefit plans," *Pilot Life*, 481 U.S. at 54 (emphasis added).

Accordingly, the Ninth Circuit decision cannot be squared with ERISA's provisions, structure or purposes. Instead, the decision marks an attempt to return to the pre-ERISA era when plans primarily were governed by fifty different sets of state law rules, and it will produce the divisive results that ERISA proscribes—conflicting plan administration rules across the land. *Boggs v. Boggs*, 117 S.Ct. at 1762. Chaos, increased benefit costs, and a reduction or elimination of benefits are certain to follow, with plan administration for interstate employers once again becoming a Byzantine maze of conflicting federal-state regulations.

Given the "centrality of pension and welfare plans in the national economy," *Boggs v. Boggs*, 117 S.Ct. at 1760, the disruptions caused by the Ninth Circuit decision cannot stand. This Court should reverse the decision below to restore the carefully-crafted balance between state and federal law struck by Congress in ERISA and to reestablish the preeminence of ERISA's statutory scheme for regulating plan administration.

ARGUMENT

THE NINTH CIRCUIT DECISION IS INCOMPATIBLE WITH ERISA'S STATUTORY DESIGN AND PREEMPTION OF STATE LAWS AND, UNLESS REVERSED, WILL SERIOUSLY DISRUPT THE STATUTORY SCHEME.

I. Congress Designed ERISA To Provide Uniform Federal Regulation For The Administration Of All Plans, Self-Funded And Insured Alike.

ERISA was the "product of a decade of congressional study of the nation's private employee benefit system." *Mertens*, 508 U.S. at 251. ERISA plans are not only "affected with a national public interest," § 2(a), but the

appropriate balance between competing federal and state law is of paramount concern to the nation's employee benefit plan system. One of ERISA's purposes is to avoid a "multiplicity of regulation," a " 'conflict in . . . law' " and " 'conflicting directives' " between federal and state regulatory schemes. *Travelers*, 514 U.S. at 656-657 (citation omitted). In its place, Congress fashioned a federal regulatory system which includes a single standard for evaluating fiduciary conduct and a panoply of civil enforcement provisions to secure the interests of participants and beneficiaries. Congress intended to "minimize[] the need for interstate employers to administer their plans differently in each State in which they have employees." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 (1983).

To accomplish this goal, Congress enacted a detailed set of standards and duties to guide ERISA fiduciaries and thus govern the administration of both self-funded and insured ERISA plans. ERISA §§ 401-414, 503, 29 U.S.C. §§ 1101-1114, 1133. Congress designed ERISA to "protect contractually defined benefits." *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). The "written plan instrument" requirement of ERISA §§ 402 and 404 is the foundation for ERISA's entire statutory framework. This Court has described the "written plan instrument" rule as one of the Act's "core functional requirements." *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995). The plan's written document is accordingly the "cornerstone of an ERISA plan." *Hunt v. Hawthorne Associates, Inc.*, 119 F.3d 888, 891 (11th Cir. 1997). This rule mandates that all plans be established and maintained pursuant to a "written instrument," contain amendment procedures and be administered strictly "in accordance with" their written terms to the extent not inconsistent with ERISA. ERISA §§ 402(a)(1), (b)(3), 404(a)(1)(D), 29 U.S.C. §§ 1102(a)(1), (b)(3), 1104(a)(1)(D).[4] In the words

[4] The plan documents, which include the "contract or other instruments under which the plan is established or operated,"

of the key congressional report, "[a] written plan is to be required in order that every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." H.R. Rep. No. 93-1280, p. 297 (1974); *Curtis-Wright,* 514 U.S. at 83; *Hozier v. Midwest Fasteners Inc.*, 908 F.2d 1155, 1163 (3d Cir. 1990). Indeed, it would be a breach of fiduciary duty for an ERISA fiduciary not to follow the plan's written provisions, ERISA § 404, *Eley v. Boeing Co.*, 945 F.2d 276, 279 (9th Cir. 1991), subjecting it to civil suit and removal as a fiduciary, ERISA §§ 502(a)(2), (3), 409(a), 29 U.S.C. §§ 1132(a)(2), (3), 1109(a).

In expanding the scope of the saving clause, the Ninth Circuit subjected the administration of insured employee benefit plans to state common-law rules that would not apply to self-funded plans under an identical set of facts. The Circuit court's unprincipled line-drawing violates ERISA's statutory scheme, and creates powerful incentives for plan sponsors either to cut back or eliminate insured benefits altogether, or to use self-funded plans despite the greater stability and solvency of insured plans. In enacting the saving clause, Congress intended to allow the states to continue to regulate insurance companies in their *risk-spreading activities*—the core element of the "business of insurance"—through enactments such as mandated-benefit statutes. *See, e.g., Metropolitan Life Ins. Co. v Massachusetts*, 471 U.S. 724 (1985). Congress did *not* intend to surrender control to the states over the ERISA plan activities governed by the Act's substantive provisions, including its fiduciary responsibility rules and civil enforcement procedures. *Pilot Life*, 481 U.S. at 45-46.

Nothing in ERISA supports the Ninth Circuit's assumption that Congress drew any distinction between insured

---

encompass group insurance policies. 29 U.S.C. § 1102(a)(1), (b)(2); *see e.g., Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 (11th Cir. 1987); *Roe v. General American Life Ins. Co.*, 712 F.2d 450 (10th Cir. 1983).

and self-funded plans for purposes of the Act's uniform fiduciary standards, plan administration rules or exclusive civil enforcement provisions. To the contrary, ERISA's text and structure establish that its preeminent federal regulatory framework applies equally to insured plans such as the one before this Court in *Pilot Life, supra.* Congress carefully framed ERISA's definition of "employee benefit plan" to encompass *all* plans, whether established "through the purchase of insurance or otherwise." ERISA § 3(1), (2), (3). Further, the Act's fiduciary standards and civil enforcement scheme explicitly provide the exclusive source of regulation in both instances. *See* ERISA §§ 402, 404-406, 409, 502-503. Indeed, Congress had expressed strong concern that *insured* plans, because of the manner in which they were structured, generally had not been subject to the trust law principles it deemed essential to the adequate protection of the interests of plan participants. Accordingly, Congress codified these federal "trust" principles, not only to ensure "*uniformity*," but to ensure that certain "plans, such as insured plans, which do not use the trust form as their mode of funding," would be subject to the same exacting fiduciary standards. H.R. Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), 2 Legislative History of the Employee Retirement Income Security Act at 2359 ("Legislative History") (emphasis added). The statute is replete with references to insurance funding and administration of employee benefits plans, signifying Congress' recognition of the critical role group insurance plays in the employee benefit field. *See, e.g.*, ERISA §§ 102(b), 103(a)(2), 401(b)(2), 29 U.S.C. §§ 1022(b), 1023(a)(2), 1101(b)(2); *see also* 29 C.F.R. § 2560.503-1. ERISA's plain language thus indicates that the Act subjects the administration and claims-processing of *all* plans, including those plans funded or administered by insurance companies or Blue Cross/Blue Shield organizations, to the same pervasive federal regulation.

To underscore the importance of federal control in this area, Congress vested the federal courts with *exclusive*

jurisdiction over suits alleging a breach of fiduciary responsibility. ERISA § 502(e)(1). Congress, moreover, required that all suits for plan benefits, whether filed in federal or state court, be governed by uniform federal law under ERISA, and it included exclusive civil enforcement provisions which limit a participant's suit to benefits "due" under the plan's written terms. ERISA § 502(a)(1)(B). In particular, Congress made the administration of both insured and self-funded plans, including claims-processing by the plan and its ERISA claims review fiduciary, a matter of exclusive federal concern. *Pilot Life*, 481 U.S. at 45-46.

Most importantly, Congress crafted ERISA § 514 as the principal mechanism for implementing its statutory design. ERISA's preemption clause bars all state law intrusion in the areas of fiduciary conduct [5] and employee

[5] The legislative intent to preempt all state regulation of fiduciary conduct is well illustrated by H.R. 2, as reported by the House Committee on Education and Labor on October 2, 1973. It included the following preemption clause:

> It is hereby declared to be the express intent of Congress that, if any provision of this Act which relates to an aspect of fiduciary responsibility applies to a plan, then no State law which relates to the same aspect of fiduciary responsibility shall be applied to such plan.

H.R. 2, 93d Cong., 1st Sess. § 514(c)(1) (1973), 2 Legislative History at 2346. The Conference Committee ultimately broadened the preemption provision out of fear that the existing version, which superseded only state laws relating to the subject matter of ERISA, would not go far enough in foreclosing the possibility of state regulation. As noted by Senator Javits, a chief architect of ERISA, the prior version "raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme." 120 Cong. Rec. 29,942 (1974). To eliminate this possibility, the Conferees settled on a preemption clause which covered not only state laws that fell within ERISA's subject matter, including fiduciary responsibility, but also any law that could directly or indirectly affect the regulation of employee benefit plans.

benefit plan administration. ERISA § 514(a); *Pilot Life*, 481 U.S. at 47-48, 52-57; *Travelers*, 514 U.S. at 657-658, 661. ERISA's preemption clause—called the "crowning achievement of [the] legislation," 120 Cong. Rec. 29,197 (1974) (remarks of Rep. Dent)—most clearly reflected Congress' efforts to eliminate the threat of conflicting or inconsistent local regulation and establish in its stead a comprehensive and pervasive federal regulatory scheme. *Alessi v. Raybestos Manhattan Inc.*, 451 U.S. 504, 523 (1981). In this manner, Congress designed ERISA to enable the plans of interstate employers to operate in a uniform, cost-effective fashion, and " 'to predict the legality of proposed actions without the necessity of reference to varying state laws.' " *Pilot Life*, 481 U.S. at 56 (citation omitted).

This Court has carefully followed ERISA's text, structure and purposes in deciding ERISA preemption issues. ERISA's preemption clause has "unparalleled breadth," *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1147 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986), and the Act's civil enforcement provisions have their own "pre-emptive" force. *Pilot Life*, 481 U.S. at 54-56; *see* ERISA § 502(a); *Sofo v. Pan-American Life Ins. Co.*, 13 F.3d 239, 241 (7th Cir. 1994).[6] In *Travelers*, this Court explained that "preemption turns on Congress's *intent*," and that "Congress's intent" was to "establish the *regulation*" of both self-funded and insured ERISA plans " 'as *exclusively a federal concern.*' " 514 U.S. at 655-656 (citation omitted) (emphasis added). Accordingly, it reaffirmed that ERISA not only preempts state laws which " '*deal*[] *with the subject matters covered by ERISA*[,] reporting, disclosure, *fiduciary responsibility*, and the like," but its preemption clause "sweep[s]" even "more broadly."

[6] In the area of claims processing, ERISA preemption includes both state common-law claims, *Pilot Life*, 481 U.S. at 54-56, and claims based on state insurance or unfair trade practices statutes, *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988) (as amended, 1989), *cert. denied*, 492 U.S. 906 (1989); *Hogan v. Kraft Foods*, 969 F.2d 142 (5th Cir. 1992).

Id. at 661 (emphasis added). Providing clear guidelines, it explained that ERISA preemption also includes state laws which *"mandate*[] employee benefit *structures* or their *administration," "prohibit"* what is "permitted" by federal law, *"preclude uniform administrative practice,"* or provide *"alternate enforcement mechanisms." Id.* (emphasis added). Additionally, ERISA preemption arises where, as here, the state law conflicts with the substantive terms of a federal statute and " 'compliance with both . . . is a *physical impossibility* . . . or . . . state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Boggs v. Boggs*, 117 S.Ct. at 1762 (citation omitted) (emphasis added). ERISA also preempts state law rules such as notice-prejudice and *Elfstrom* where the plan's "existence" is "a critical factor in establishing liability" under the state law. *Ingersoll-Rand*, 498 U.S. at 139.

Congress' purpose, therefore, was both to allow plan sponsors a broad freedom of employee benefit plan design, *FMC Corp. v. Holliday*, 498 U.S. 52, 59-60 (1990), and to make ERISA "the *exclusive* form of regulation for . . . plans within the areas covered" by the Act, leaving intact only those state laws "which *otherwise* regulate insurance, banking or securities."[7] The incorporation of the insurance saving clause into ERISA § 514 is not inconsistent with the congressional objectives. Congress fully recognized that under ERISA "state laws regulating banking, insurance and securities [would] remain unimpaired," while simultaneously noting that the Act "provides for a uniform source of law for evaluating the fiduciary conduct of *persons acting on behalf of* employee benefit plans."[8] In contrast to its "repeatedly emphasized purpose" to make federal law preeminent in the fiduciary field, there

[7] Explanatory Statement Concerning S. 3589, 116 Cong. Rec. 7284, 7288 (1970) (emphasis added).

[8] *See* Explanatory Statement Concerning S. 3589, 116 Cong. Rec. 7286 (1970); Explanatory Statement Concerning H. 16462, 116 Cong. Rec. 7570 (1970) (emphasis added).

is a "stark absence" in the legislative history of any intention to save common-law rules such as the "notice" rule preserved by the Ninth Circuit. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 148. If Congress had intended to exempt insurance company fiduciaries, acting on behalf of employee benefit plans, from the uniform system it established, there certainly would have been some reference to this fact in ERISA's legislative history, which spans over 15 volumes of material. Congress' silence on this subject is even more significant inasmuch as over 80% of the welfare benefit plans in the United States around the time of ERISA's passage were insured and administered by insurance companies.[9] Under these circumstances, Congress simply could not have intended such a dramatic exception to its regulatory scheme without some affirmative indication to that effect. *See NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981).

ERISA also establishes a comprehensive and remedial framework for plan participants with benefit claims disputes. ERISA §§ 503, 502(a)(1)(B) and 29 C.F.R. § 2560.503-1(c)-(g) contain precise provisions governing the filing and processing of ERISA claims, the fiduciary review procedure for denied claims, and the filing of suits for relief when administrative remedies are exhausted. These procedures and civil enforcement provisions apply equally to both self-funded and insured plans, and are the *exclusive* means of redress, carrying their own "pre-

[9] *See Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978) (Congress was aware that insurance was the most common source of plan funding). According to Labor Department statistics, 91% of the welfare benefit plans covering fewer than 100 employees and 83% of welfare benefit plans covering 100 or more employees were insured and administered by insurance companies. 4 Health and Population Study Center, Battelle Human Affairs Research Centers, *Employee Welfare Benefit Plans and Plan Sponsors in the Private Nonfarm Sector in the United States, 1978-1979* at 44 (1980).

emptive force" that bars all state law claims. *Pilot Life*, 481 U.S. at 45-46, 52-54. Section 503 requires "*every* employee benefit plan" to comply with benefit claims regulations issued by the Secretary of Labor and to provide a claims review procedure conducted by the "appropriate named fiduciary" (emphasis added). The regulations specify that the plan's claims procedure may provide for the filing of claims with an insurance company, and "a claim is filed when the requirements of a reasonable claim filing procedure . . . have been met." 29 C.F.R. § 2560.503-1(c)-(d). The regulations also state that an insurance company charged with the review of denied claims is the "appropriate named fiduciary under § 503." *See* 29 C.F.R. § 2560.503-1(g)(2). Like all other fiduciaries, ERISA requires the fiduciary under § 503 to administer the plan strictly "in accordance with" its written terms. ERISA § 404(a)(1)(D).

Further, Congress intended that *all* suits under ERISA to recover plan benefits, whether self-funded or insured, should " 'be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act,' " which has its own "pre-emptive force." *Pilot Life*, 481 U.S. at 56 (citation omitted). ERISA's goal, accordingly, was that the courts would develop "a body of *Federal substantive law* . . . to deal with issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits) (emphasis added). Congress' objective was that "*all* suits brought by . . . participants asserting improper processing of claims . . . by treated as *federal* questions governed by § 502(a)." *Pilot Life*, 481 U.S. at 54 (emphasis added). This explicit direction to develop a uniform body of federal common law to govern claims payment under both self-funded and insured plans shows conclusively that ERISA's purpose was to occupy the field of plan regulation and civil enforcement, to the exclusion of

all state rules of general application. Indeed, as the Ninth Circuit well knew, the state rules that it preserved could *not* be incorporated into federal common law under ERISA. To do so would violate the basic tenets that the courts, in creating federal common law, cannot " 'defeat the scheme created by Congress in ERISA,' " and that " '[c]laims relating to ERISA plans must . . . invoke the *specific remedies* of ERISA.' " *Pacificare Inc. v. Martin*, 34 F.3d 834, 836 (9th Cir. 1994) (citations omitted) (emphasis added). "Recourse to federal common law is improper when it would be used to rewrite ERISA rather than to implement its policies." *Member Services Life Ins. Co. v. American Nat. Bank and Trust Co. of Sapula*, 130 F.3d 950, 957 (10th Cir. 1997).

Employee benefit plans nationwide are either self-funded or are underwritten and administered in whole or in part by insurance companies or Blue Cross/Blue Shield organizations, all of which stand in the place of the plan's administrator and trustees in handling benefit claims. The processing and review of benefit claims by insurance companies thus constitute an integral part of ERISA plan administration, directly regulated by the Act's fiduciary responsibility provisions in §§ 404 and 503, and regulations promulgated under § 503. Indeed, by treating insurance companies as "named fiduciaries" and subjecting them to the full range of fiduciary duties, both Congress and the Department of Labor have acknowledged that, in this context, insurance companies are proxies for the plan and its administrator and trustees, with the very same fiduciary obligations, liabilities and protections under federal law. ERISA §§ 404, 409, 503, 514(a). Because the Ninth Circuit would insulate this regulation of claims processing and payment from state law if the plan were self-funded, *see, e.g., Moore v. Provident Life & Accident Ins. Co.*, 786 F.2d 922, 926-927 (9th Cir. 1986), its resurrection of state law as the principal mechanism for regulating this area is totally at odds with ERISA's carefully-crafted design. "States are not free to change

ERISA's structure and balance," even by *statute*. *Boggs v. Boggs*, 117 S.Ct. at 1762.

II. The Ninth Circuit Saving Clause Holding Squarely Conflicts With ERISA.

A. *General Common-Law Rules Do Not Constitute Regulation Of The "Business Of Insurance" Under The McCarran-Ferguson Act, Upon Which ERISA's Saving Clause Is Based.*

The Ninth Circuit necessarily held that California's notice-prejudice rule "relates to" employee benefit plan administration within the meaning of ERISA's broad preemption clause in § 514(a). Pet. App. at 5a. The Circuit court then turned its focus to ERISA's saving clause, § 514(b)(2)(A), one of the Act's " '*narrow* exceptions' " to preemption, *Travelers*, 514 U.S. at 657 (citation omitted) (emphasis added). This clause preserves only state law that "regulates insurance."

To be exempt under ERISA's saving clause, a state law must not only pass a "common-sense" test of being specifically aimed at the insurance industry; it must also satisfy the three McCarran-Ferguson criteria, including the transfer of risk of loss, for determining whether the practice the state law seeks to govern is the "business of insurance." *Pilot Life*, 481 U.S. at 48-49. This Court has construed ERISA's saving clause and the narrow definition of the "business of insurance" in the McCarran-Ferguson Act in a similar manner. *Metropolitan Life*, 471 U.S. at 742-743; *Pilot Life*, 481 U.S. at 48-51. Under "state regulation," the McCarran-Ferguson Act specifies that the "business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a). Under "Federal regulation," it provides that only a narrow range of state law will be exempt from federal preemption. No federal statute shall be construed to "supersede any law *enacted* by any State for the purpose of

regulating the *business of insurance*, or which imposes a fee or tax upon such business," unless the federal act "specifically relates to the business of insurance." § 1012(b) (emphasis added). Accordingly, the McCarran-Ferguson "exemption [from federal preemption] is for the 'business of insurance,' *not* the 'business of insurers.' " *Royal Drug*, 440 U.S. at 211 (citation omitted) (emphasis added).

California's notice-prejudice rule is merely a common-law rule of general application which fails both the "common-sense" test and the three McCarran-Ferguson criteria. In construing the saving clause, the Ninth Circuit disregarded the careful symmetry between the two statutory schemes. "In essence . . . the McCarran-Ferguson Act permits the states to regulate insurance in such primary areas as licensing, underwriting, reserves, insurance policy content, and taxation, but does *not* permit state regulation in areas governed by ERISA, such as plan administration, fiduciary liability, claims-handling and civil enforcement." David L. Bacon, et al., *Employee Benefits Guide* (Matthew Bender & Co.) (1997), § 8.02[1] (emphasis added). In holding that the notice-prejudice rule was shielded, the Circuit court construed the saving clause in a manner that not only is refuted by ERISA's objectives and framework, but also violates the plain meaning of its language.

1. *The Notice-Prejudice Rule Admittedly Does Not Involve The Transfer of Risk, An Essential McCarran-Ferguson Requirement.*

As stated in *Pireno*, 458 U.S. at 127-128, McCarran-Ferguson's first, preeminent requirement is the transfer of risk of loss, which the Ninth Circuit admitted was not triggered by the notice-prejudice rule. Pet. App. at 2a, 5a; *Cisneros*, 134 F.3d at 945-946. The Circuit court summarily dismissed the risk-spreading requirement as unessential. *Id.* This was clear error; the failure to spread risk, by itself, places the notice-prejudice rule far outside the saving clause. This Court has described the activity of spreading and underwriting a policyholder's risk in

forceful, unambiguous terms as one of the "*primary* features of an insurance contract," "an *indispensable* characteristic of insurance" and "a *critical determinant* in identifying insurance." *Royal Drug*, 440 U.S. at 211-213 (emphasis added). In the Court's view, it is "'the *one earmark of insurance* as it has commonly been conceived of in popular understanding and usage.'" *Id.* at 212 (citation omitted) (emphasis added).

Unfortunately, the Ninth Circuit simply seized upon one line of ambiguous dictum in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982), that "none of [the McCarran-Ferguson factors] is necessarily determinative in itelf." From that language the Circuit court somehow concluded that a state common-law rule, such as the notice-prejudice rule, directly impacting ERISA plan administration, could be "saved" even if it did not involve risk transfer.

A common-sense reading of *Royal Drug* and *Pireno* indicates exactly the opposite. In *Pireno*, the Court scrutinized all three McCarran-Ferguson criteria in determining whether the conduct of a peer review committee, which decided whether certain medical provider fees were necessary and reasonable, fit the narrow "business of insurance" exception from antitrust law, and concluded that none was satisfied. 458 U.S. at 129. First, the Court observed that peer review played no part in the spreading or underwriting of risk, because the transfer of risk is effected by the insurance policy and "is complete at the time the contract is entered." 458 U.S. at 130. It also noted *Royal Drug's* observation, 440 U.S. at 220-221, that parts of the legislative history "strongly suggest that Congress understood the business of insurance to be the *underwriting and spreading of risk*." 458 U.S. at 127-128 (emphasis added). As to the second criterion, the Court distinguished between the writing of the insurance policy and its "interpretation and enforcement," explaining that these latter activities were not an integral part of the insured-insurer relationship. *Id.* at 128-129. Finally, the

Court concluded with respect to the third criterion that peer review practices "are not limited to entities within the insurance industry." *Id.* at 132.

The *Pireno* Court's dictum that "[n]one of these criteria is necessarily determinative in itself" provides no support for the proposition that two out of three of the criteria are enough. The *Pireno* Court carefully examined "all the criteria" and found that *each* supported the conclusion that peer review did not constitute the "business of insurance." The Ninth Circuit overlooked this cogent reasoning in *Pireno* and its approval of *Royal Drug's* unambiguous dictate that risk transfer itself is an "'*indispensable* characteristic of insurance.'" 458 U.S. at 127-128 and n.7 (citation omitted) (emphasis added). Read together, Royal *Drug* and *Pireno* establish, at the very least, that all three criteria are significant, and no state law will satisfy the "business of insurance" requirement ***unless*** it involves the transfer of risk—the one "indispensable" insurance characteristic, and a "critical determinant" in identifying insurance. *Royal Drug*, 440 U.S. at 211-213; *Pireno*, 458 U.S. at 127-28 and n. 7. ***See also Barnett Bank of Marion County, N.A. v. Nelson***, 517 U.S. 25, 39 (1996) (the spreading of risk lies "at the core of McCarran-Ferguson . . . concerns"). In ***Anderson v. Humana, Inc.***, 24 F.3d 889, 892 (7th Cir. 1994), the Seventh Circuit accurately captured the difference between state laws that satisfy the "business of insurance" requirement and those that merely embody general common-law principles. It concluded that "insurance" under McCarran-Ferguson "requires some sort of component of risk pooling, and the sort of regulation preserved to the domain of the states is that expressly directed at that insurance component—as opposed to, say, laws of general application that just happen to have some bearing on the affairs of insurers." 24 F.3d at 892.

Indeed, this Court has never found a state law to regulate the "business of insurance" within the meaning of the

McCarran-Ferguson Act *unless* that law involved such matters as insurance taxation, *see* 15 U.S.C. § 1012(a), or a practice directly affecting the spreading and underwriting of the risk of loss, or other matters unique to insurance companies, such as selling and advertising of policies and the licensing of insurers and their agents. *See, e.g., SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (a state statute aimed at protecting the interests of stockholders in insurance companies does not regulate "business of insurance" under McCarran-Ferguson); *Metropolitan Life, supra* (ERISA "saves" state mandated-benefit statute which satisfies all three McCarran-Ferguson criteria, including risk transfer); *Department of Treasury v. Fabe*, 508 U.S. 491 (1993) (ERISA "saves" portions of a state statute that govern priority of claims against insolvent insurers; all three criteria met).

In line with *Royal Drug, Pireno, Metropolitan Life* and *Pilot Life*, the Fifth Circuit has held that a state law must satisfy *all three* of the McCarran-Ferguson Act criteria for the "business of insurance" to fall within ERISA's narrow saving clause. *CIGNA Healthplan v. Louisiana*, 82 F.3d 642, 650 (5th Cir.), *cert. denied*, 117 S.Ct. 387 (1996); *Tingle v. Pacific Mut. Ins. Co.*, 996 F.2d 105, 108 (5th Cir. 1993). *Tingle* observed that "[t]he Eleventh, Sixth, Tenth and Eighth Circuits have all held that a statute's failure to satisfy one or more of the *Metropolitan Life* factors excludes it from the ERISA saving insurance clause." 996 F.3d at 110. Moreover, seven Circuits have ruled that state laws which fail to transfer an insurance policyholder's risk do not involve the "business of insurance" and therefore are not within the saving clause,[10] and no Circuit court prior to *Cisneros* ever held that a state law came within the saving clause where the essential spreading of risk was not involved.

[10] *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990) (state law which fails to transfer risk is preempted), *cert. denied*, 501 U.S. 1238 (1991); *Tingle*, 996 F.2d at 108 (state law which fails to transfer risk is preempted); *Insurance Bd. v. Muir*, 819 F.2d 408, 412 (3d Cir. 1987) (state law which does not affect transfer of risk or satisfy any other McCarran-Ferguson criterion is preempted); *Davies v. Centennial Life Ins. Co.*, 128 F.3d 934, 940 (6th Cir. 1997) (same); *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 428-30 (6th Cir. 1989) (state law which fails to transfer risk or satisfy third criterion is preempted); *DeBruyne v. Equitable Life Assurance Soc.*, 920 F.2d 457, 468-70 (7th Cir. 1990) (same); *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 455-56 (10th Cir. 1989) (state law which fails to transfer risk or satisfy second criterion is preempted); *Anschultz v. Connecticut General Life Ins. Co.*, 850 F.2d 1467, 1468-69 (11th Cir. 1988) (same).

2. *Nor Does The Notice-Prejudice Rule Satisfy The Other Two Essential McCarran-Ferguson Criteria.*

The other two McCarran-Ferguson criteria—namely, the state law is an integral part of the *insurance policy* relationship between insured and insurer, and is limited to entities within the insurance industry—must also be satisfied in order for a state law to be within the saving clause. The Ninth Circuit's peremptory conclusion that these criteria were triggered by the notice-prejudice rule defies common sense and conflicts sharply in principle with this Court's *Metropolitan Life* and *Pilot Life* decisions.

Although frequently "identified with" the insurance industry, California's notice-prejudice rule has its trunk and roots in two common-law contract rules of the broadest general application which apply to *all* private parties, including insurance companies. First, parties to all contracts have a duty to cooperate, including a duty regarding notices, *see Restatement (2d) of Contracts*, § 205, and illustration 7 (insurance policy notice and proof of loss provisions are subject to duty to cooperate), and only a prejudicial breach will relieve the other party of its duty to perform.[11]

[11] *See Aetna Cas. and Surety Co. v. Murphy*, 206 Conn. 409, 538 A.2d 219 (1988) (justifying adoption of notice-prejudice rule on

This contract rule applies not only to insurance contracts in California, *Campbell v. Allstate Ins. Co.*, 60 Cal.2d 303, 305 (1963) ("notice-prejudice" rule based on "cooperation" clause in insurance contract), but also to *every* contract in California. *Universal Sales Corp. v. California Press Mfg. Co.*, 20 Cal.2d 751, 771-772 (1942) (the duty of cooperation exists "[i]n every contract.") Second, state common law generally requires that prejudice must be shown before the failure to perform a contractual obligation or to give a required notice will work a forfeiture. *See, e.g., Conservatorship of Rand*, 49 Cal.App. 4th 835 (1996); *Industrial Asphalt v. Garrett Corp.*, 180 Cal.App.3d 1001 (1986); *see also Restatement (2d) of Contracts*, § 229.

Unlike the mandated-benefits statute in *Metropolitan Life, supra*, the California rules involving "notices" and prejudice are procedural devices which fail to satisfy the second McCarran-Ferguson criterion. This test does not focus on the "relationship" in general, but rather specifically on the insurance "policy relationship" between the insurer and the insured. *SEC v. National Securities*, 393 U.S. at 460. The California rules do not form an integral part of the insurance policy relationship because they do not center on insurance policy content; they do not even define eligibility or the nature, amount or duration of insurance coverage. Instead, the California rules merely change the notice requirements for claims asserted under the contract,[12] and as such they only purport to "regulate[] the *administration* of policies [or contracts], *not* their substantive terms." [13]

---

general contract principle of avoiding a disproportionate forfeiture); *Smith, Valentino & Smith, Inc. v. Superior Court of Los Angeles County*, 17 Cal.3d 491, 497 (1976) (prior breach may be *de minimus*).

12 *Davies, supra.*

13 *See Smith v. Jefferson Pilot Life*, 14 F.3d at 570 (ERISA preempts statute requiring notice for cancellation of insurance

Further, under McCarran-Ferguson "the 'business of insurance' should be read to single out one *activity* from others, not to distinguish one *entity* from another." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 781 (1993) (emphasis added). The Ninth Circuit applied the California "notice" rule to the *activity* of deciding whether plan benefits are payable. A third-party administrator or an insurance company delegated responsibility for processing claims under an ERISA plan is performing ERISA mandated functions and is not engaged in the business of insurance, *cf. Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 423-424 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). Further, this ERISA-regulated conduct is not subject to suit under state laws. *Pilot Life, supra.* This plan activity does not involve risk-spreading, does not focus on the insurance policy relationship or center on its content, and, accordingly, it does not satisfy the first or second McCarran-Ferguson criteria. Additionally, the activity fails to satisfy the third criterion because it is not limited to the insurance industry. For a multitude of plans, claims adjudication is performed by employers, trustee committees, third-party administrators, or utilization review committees or peer review organizations. *See Pireno, supra.* The ERISA-governed activity of deciding claims, including the review of denied claims pursuant to § 503, does not become the "business of insurance" merely because it is delegated to an insurance company rather than being performed by the Plan Administrator or the plan's trustees.

California's notice-prejudice rule, therefore, no more constitutes a law "regulat[ing] insurance" than any other common-law rule of general application, such as rules

---

coverage to be effective) (emphasis added); *Davies*, 128 F.3d at 942 (ERISA preempts statute permitting rescission of insurance policy in case of willful misrepresentation by plan participant; saving clause not applicable because statute does not spread risk or "affect the substantive terms" of the insurance contract).

regarding "ambiguity," "unreasonableness," or "material misrepresentation," "adhesion contract" rules, or extra-contractual liability doctrines. Consequently, the notice-prejudice rule is no more specific to the industry and no more satisfies any of the McCarran-Ferguson criteria than the Mississippi law of "bad faith" addressed by this Court in *Pilot Life*, 481 U.S. at 49-50. Even though the Mississippi Supreme Court had "*identified* its law of bad faith with the insurance industry," this Court concluded that the "*roots* of this law" were "firmly planted in the general principles of Mississippi tort and contract law." *Id.* at 49-50 (emphasis added). As a result, it held that the state law did not pass the "common sense" test for "regulating insurance." *Id.* Further, it held that the law did not satisfy all of the McCarran-Ferguson criteria because it failed to involve the transfer of risk of loss, was "no more 'integral' to the insurer-insured relationship than any State's general contract law," and was not unique to the insurance industry. *Id.* at 50-51.

California's "notice" rule is exactly parallel. While often "identified" with insurance cases, the doctrine does not govern a practice which causes the transfer of risk, affects the substantive coverage provisions of insurance policies, or is limited to insurance companies. Instead, the rule merely derives from general principles of contract law applicable to all California contracts.

This Court's decisions in *Metropolitan Life*, 471 U.S. at 744, and *Pilot Life*, 481 U.S. at 48-50, both illustrate the fundamental flaws in the Ninth Circuit's holding. In *Metropolitan Life*, the state mandated-benefits statute spread the risk of loss to the insurer, it was an integral part of the insurance policy relationship because it required substantive coverage, and it was limited to the insurance industry. Accordingly, the statute not only fit the narrow category of law exempt from federal preemption under McCarran-Ferguson as a "law enacted by [a] State for the purpose of regulating the business

of insurance," 15 U.S.C. § 1012(b), but clearly qualified as a law "regulating insurance" under ERISA's narrow saving clause. Indeed, the statute provided the very example of local regulation which ERISA's saving clause was designed to protect.

Perhaps even more importantly, the mandated-benefit statute's subject matter concerned an area that was not then regulated by ERISA at all—the coverage provided by employee welfare benefit plans—and accordingly involved none of the preeminent regulatory concerns present here. Thus, *Metropolitan Life* lacked the direct conflict between federal and state law which necessarily provided a critical and decisive element in *Pilot Life* and is present here. *Metropolitan Life* acknowledged, moreover, that ERISA foreclosed *direct* state regulation of employee benefit plans. 471 U.S. at 747. Clearly, state regulation of a plan fiduciary's review of a claim, irrespective of the plan's funding mechanism, directly intrudes on ERISA fiduciary standards and the plan's administration, and cannot be sustained. Indeed, the Ninth Circuit decision will impose a multiplicity of conflicting federal-state laws on ERISA plan administration and *surrender* one of its most significant portions—the payment of plan benefits—to fifty different sets of state law rules.

Not only was the issue presented in *Metropolitan Life* separate and distinct from that involved here, but the consequences for employee benefit plan administration are far different. *Metropolitan Life* recognized only that "national plans" would face some "disuniformities" if they "enter[ed] into local markets to purchase insurance." 471 U.S. at 747. In contrast, the Ninth Circuit decision will generate more than mere "disuniformity"—it will frustrate the very principles central to ERISA's statutory scheme. Unlike *Metropolitan Life*, this dysfunction cannot be viewed simply as an incidental, but "inevitable result" of Congress' desire to save state insurance regulation. Rather, these consequences are directly contrary to Congress' purposes in enacting ERISA.

The Ninth Circuit's erroneous application of the three McCarran-Ferguson criteria will have a harsh impact in the area of ERISA plan regulation and will apply in all other McCarran-Ferguson cases, disrupting long-standing law in that area.

B. *Even If Otherwise Applicable, The Saving Clause Would Not Shield State Laws Directly Conflicting With ERISA's Statutory Provisions Or Objectives, Including Its Exclusive Civil Enforcement Scheme.*

Even if the notice-prejudice rule otherwise fell within the narrow saving clause, the exemption would not shield the rule because it directly conflicts with ERISA's statutory provisions and frustrates its objectives, including the exclusive civil enforcement scheme. *See Harris Trust*, 510 U.S. at 99 n.9; *Pilot Life*, 481 U.S. at 51-57.

This Court has acknowledged that an understanding of ERISA's saving clause must be informed by "the legislative intent" and "the role of the saving clause in ERISA *as a whole*." *Pilot Life*, 481 U.S. at 51-52 (emphasis added). In *Pilot Life*, the Court held that Congress intended ERISA's civil enforcement mechanisms in § 502, similar to those under § 301 of the Labor-Management Relations Act ("LMRA"), to be the *exclusive* remedy in claims disputes and to have their own "pre-emptive effect." *Id.* at 51-52, 55-57. Applying conflicts analysis, it then held that even if a state common-law claim based on the nonpayment of benefits could somehow be deemed a law regulating insurance, the saving clause must be read as part of ERISA as a whole and, therefore, will not shield state laws that conflict with any of the Act's substantive provisions, or provide a remedy beyond what is contained in its carefully-drawn civil enforcement provisions.

California's common-law notice-prejudice rule directly conflicts with several of ERISA's central statutory provisions and its main objectives and, accordingly, the rule is barred under traditional conflicts analysis. First, as the Ninth Circuit conceded in *Cisneros*, the notice-prejudice rule causes "a plan's written terms [to be] *altered*." 134 F.3d at 947. Thus, the rule squarely conflicts with ERISA's fiduciary standards in § 404 including the "written plan instrument" rule, which secures several of Congress' most important purposes. It assists in ensuring the nationally uniform administration of employee benefit plans, *see Travelers*, 514 U.S. at 657, thus allowing interstate employers to predict the legality of proposed actions " 'without the necessity of reference to varifying state laws,' " *Pilot Life*, 481 U.S. at 56 (citation omitted). Of equal importance, it also "*protect*[*s*] *the financial integrity* of pension and welfare plans by *confining* benefits to the terms of the plan as written." *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir. 1992) (Posner, J.) (emphasis added).

Second, the notice-prejudice rule squarely conflicts with ERISA's exclusive civil enforcement provisions in § 502(a) which protect exactly the same congressional goals. ERISA authorizes suit for benefits *only* if they are "due" under the plan's written terms, *Pilot Life*, 481 U.S. at 52-57, a suit that "falls directly under § 502(a)(1)(B) which provides an *exclusive federal cause of action*." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62 (1987) (emphasis added). In direct conflict with these commands, the Ninth Circuit adopted the notice-prejudice rule to furnish a state remedy under which benefits are *not* "confin[ed] . . . to the terms of the plan as written." *Pohl, supra.* The lower court's decision thus clashes with the very purpose underlying § 502(a):

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others . . . would be completely undermined if ERISA-plan participants . . . were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life, 481 U.S. at 54.

Apart from the Ninth Circuit, the Courts of Appeals have consistently held that ERISA bars the use of any common-law doctrines which either conflict with its carefully-drawn statutory framework, or cause a departure from the written plan instrument.[14] Similarly, these Courts of Appeals have held that ERISA preempts state common-law "notice" rules or "notice" statutes.[15] The rationale behind these decisions is that such state laws fall within ERISA's broad preemption clause in § 514(a), and conflict either with the sponsor's freedom of plan design or the Act's comprehensive regulatory scheme.

California's notice-prejudice rule also conflicts with yet another ERISA provision central to the statutory scheme —the orderly internal resolution of benefit disputes as a prerequisite to filing suit under the Act's exclusive civil

---

[14] *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986) ("federal courts may not use state common law to rewrite a federal statute"); *Member Services Life Ins. Co.*, 130 F.3d at 957-58 (courts cannot "rewrite [ERISA] to satisfy [their] proclivities"); *Pohl*, 956 F.2d at 128 (same); *Northeast Department ILGWU v. Teamsters Local No. 294*, 764 F.2d 147, 158 n.8 (3d Cir. 1985) (judge-made rules of interpretation of insurance contracts are not the kind of insurance regulation Congress intended to preserve); *Edwards v. Great-West Life Assur. Co.*, 20 F.3d 748, 750 (7th Cir. 1994) (courts cannot "rewrit[e] the plan"); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 490 (1st Cir. 1989) (same); *Coleman v. Nationwide Ins. Co.*, 969 F.2d 54, 56, 59 (4th Cir. 1992) (same), *cert. denied*, 506 U.S. 1081 (1993). *But see O'Connor, supra*, adopting the *Cisneros* holding.

[15] *See, e.g., Nazay v. Miller*, 949 F.2d 1323, 1336-37 (3d Cir. 1991) (ERISA preempts "notice-prejudice" rule with respect to self-funded plan); *Howard v. Gleason Corp.*, 910 F.2d 1154, 1157-58 (2d Cir. 1990) (ERISA preempts state statute requiring a terminated employee be notified of insurance conversion options); *Smith v. Jefferson Pilot Life Ins. Co.*, 14 F.3d 562, 571 (11th Cir.) (ERISA preempts state statute governing notice to insured of termination of coverage), *cert. denied*, 513 U.S. 808 (1994); *Doe v. Blue Cross & Blue Shield United*, 112 F.3d 869, 874-875 (7th Cir. 1997) (ERISA plan's internal limitations period controls over state statute).

enforcement system. Notice of claim deadlines are standard features of many ERISA plans, and protect against the difficulties of proof, expenses and errors associated with stale claims.[16] A plan's written procedures, and time limits for the filing of claims, 29 C.F.R. § 2560.503-1(b), (c), no less than the fiduciary review procedure required by ERISA § 503, are essential steps in the plan's administrative remedies.[17] The Ninth Circuit did not find that the time provided by the Plan for submitting notice of claim, one year and 180 days, failed to be "reasonable." 29 C.F.R. § 2560.503-1(b), (c), (d). A core part of this Court's *Pilot Life* holding is that ERISA suits for plan benefits must arise under federal law in a manner similar to those under § 301 of the LMRA. 481 U.S. at 55-56. Under § 301, an agreement's administrative remedies, including its written time limits for filing a claim, must be followed as a prerequisite to filing suit.[18] In this case, because of Ward's admittedly late submission, *no* benefits were *"due . . .* under the terms of [the] plan." ERISA § 502(a)(1)(B) (emphasis added). In order to write an opinion that would permit Ward's suit to proceed nonetheless, the Ninth Circuit was virtually required to shred ERISA's carefully-drawn text governing fiduciary stand-

---

[16] *Central States, Southeast and Southwest Areas Pension Fund v. Mississippi Warehouse Corp.*, 853 F. Supp. 1053, 1058 (N.D. Ill. 1994); *Tiger v. AT&T Tech. Plan for Employees' Pensions, Disability Plan*, 633 F. Supp. 532, 534 (E.D. N.Y. 1986).

[17] *See Kinkead v. Southwestern Bell Sick. & Acci. Corp. Disability Benefit Plan*, 111 F.3d 67, 68 (8th Cir. 1997); *Kennedy v. System One Holdings, Inc.*, 835 F. Supp. 947, 950 n.3 (S.D. Tex. 1993); *Christie v. K-Mart Corp. Employees Retirement Pension Plan*, 784 F. Supp. 796, 804 (D. Kan. 1992); *see also White v. Jacobs Engineering Group Long Term Disability Plan*, 896 F.2d 344, 346-47 (9th Cir. 1990) (plan's 60 day time limit for appealing denied claim is enforceable).

[18] *See, e.g., Laws v. Calmat*, 852 F.2d 430, 434 (9th Cir. 1988); *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993); *Vaca v. Sipes*, 386 U.S. 171, 184-85 (1967).

ards, claims review procedures and the civil enforcement mechanisms.

This Court has stated that "[t]he authority of courts to develop a '*federal* common law' under ERISA . . . is *not* the authority to revise the text of the statute." *Mertens*, 508 U.S. at 259 (citation omitted) (emphasis added). So, too, the federal courts cannot "save" *state* common-law rules in order to accomplish the same impermissible end. "[V]ague notions of a statute's 'basic purpose' "—*including* the "goal of 'promot[ing] the interests of employees and their beneficiaries in employee benefit plans' "—cannot be used to "overcome the words of its text regarding the *specific* issue under consideration." *Id.* at 261-262. Instead, a plaintiff such as Ward must be able to point to a specific section of ERISA which "affirmatively *authorizes*" the relief sought, *id.* at 255 n.5, a critical element he admittedly cannot satisfy because the statute itself requires the claim denial. ERISA §§ 404 and 502. The carefully-crafted nature of ERISA's statutory scheme precludes the Ninth Circuit's efforts to rewrite and "fine-tune" the statute in favor of participants. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 147-148; *Pilot Life*, 481 U.S. at 54.

C. *Additionally, ERISA And McCarran-Ferguson Would Bar Any State Laws Directly Impacting An ERISA Fiduciary's Claims-Handling For An Insured Plan.*

Even if the notice-prejudice rule somehow were deemed a law "regulating insurance," ERISA and the McCarran-Ferguson Act would preempt its application to fiduciaries performing the ERISA mandated function of reviewing denied claims for insured plans pursuant to § 503.

First, as noted by this Court in *Travelers*, 514 U.S. at 651, Congress significantly "limited" the already narrow scope of ERISA's saving clause by adding the "deemer" clause, which precludes any plan from being "deemed" an "insurance company" or "engaged in the business of insurance . . . ." ERISA § 514(b)(2)(B), 29 U.S.C.

§ 1144(b)(2)(B). The "deemer" clause prohibits state insurance law from interfering with plan operations including an insurance company performing a mandated ERISA function on behalf of a plan, such as reviewing denied claims pursuant to § 503.

This significant qualification to the saving clause reflects, in unmistakable terms, Congress' objective to free the *administration* of insured plans from the possibility of direct state regulation through some artful or overly-broad construction of the insurance exception. When the "deemer" clause is read in conjunction with ERISA's purposes, it is clear that the Act preempts state regulation directed to fiduciary conduct and plan administration—regulation which strikes at the heart of ERISA—even where the plan is administered in part through an insurance company. Instead, the insurance company, in its role as claims review fiduciary under § 503, stands in the shoes of the plan's administrator and trustees and is subject to the same exacting ERISA fiduciary standards including § 404(a)(1)(D). The "deemer" clause thus prevents interference with the insurance company's plan activities. This Court recognized that point in *Metropolitan Life*, 471 U.S. at 741, where it determined that the "deemer" clause was intended to "exemp[t] from the savings clause laws regulating insurance companies that apply directly to benefit plans."

Second, even were this Court to conclude that an ERISA fiduciary's administration of claims somehow constituted the "business of insurance," a joint application of ERISA and the McCarran-Ferguson Act would also bar application of the notice-prejudice rule.[19] McCarran-Ferguson specifies, consistent with federal supremacy principles, that federal legislation which "*specifically relates*"

---

[19] By its express terms, ERISA does not "alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." ERISA § 514(d), 29 U.S.C. § 1144(d). The McCarran-Ferguson Act is such a pre-existing law. *See Metropolitan Life*, 471 U.S. at 744 n.21.

to the business of insurance will displace any conflicting state law. 15 U.S.C. § 1012(b) (emphasis added).

As demonstrated, ERISA exclusively and directly governs fiduciary standards by requiring that *all* plans, both self-funded and insured, be in writing and be administered strictly "in accordance with" their written terms; it mandates a fiduciary review procedure for denied claims pursuant to § 503; and it also provides an *exclusive* civil enforcement scheme that limits recovery to benefits "due" under the plan's written terms. ERISA §§ 402(a)(1), 404(a)(1)(D), 503, 502(a)(1)(B). If a notice-prejudice rule which impacts fiduciary standards, plan administration and suits for benefits "regulates the relationship between insurer and insured,"[20] then *a fortiori* ERISA also "specifically relates" to the business of insurance in this context. As a result, ERISA and McCarran-Ferguson would operate in conjunction to preempt the notice-prejudice rule pursuant to 15 U.S.C. § 1012(b). *See Harris Trust*, 510 U.S. at 99-100 (ERISA preempts state regulation of the "business of insurance" if it presents a "'direct conflict'" with federal law or "'stands as an obstacle to the accomplishment of the full purposes and objectives of Congress'" (citation omitted)). As the Ninth Circuit acknowledged in an analogous context:

> Asuming arguendo that [the state law] is a state law regulating insurance . . . appellant's argument . . . ignores those ERISA sections that undeniably 'specifically relate' to the business of insurance. . . . If McCarran-Ferguson applies, therefore, ERISA falls within the clause excepting federal laws that 'specifically relate' to the business of insurance.

Hewlett-Packard Co. v. Barnes, 571 F.2d 502, 505 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

---

[20] *See O'Connor*, 146 F.3d at 963, a decision adopting the *Cisneros* holding.

III. The Ninth Circuit Preemption Clause Holding Squarely Conflicts With ERISA.

The Ninth Circuit decision that the *Elfstrom* rule escapes preemption directly conflicts with ERISA's comprehensive statutory scheme, and once again flouts *Pilot Life* and the carefully-articulated preemption standards in *Travelers, Dillingham* and *Ingersoll-Rand*. Ignoring this Court's preemption jurisprudence, the Circuit court failed to analyze correctly whether California agency law even "relates to" an ERISA plan within the meaning of § 514(a), much less whether it is barred by field or conflicts preemption. Instead, it mechanically applied state agency law based on a single, impliedly-overruled case, *Turrill v. Life Ins. Co. of North America*, 753 F.2d 1322 (5th Cir. 1985), which permitted state law to govern a suit for benefits under an insured ERISA plan. The Circuit court failed to recognize that *Turrill* was decided *prior* to *Pilot Life* at a time when the courts consistently but incorrectly believed ERISA preemption did not apply to such suits.[21]

A. Elfstrom *Is A Pre-ERISA Attempt By The California Supreme Court To Regulate The Adminstration Of Employee Benefit Plans.*

If ever there were a pre-ERISA state rule designed to regulate group insurance plan administration, it is the one adopted by the 1967 *Elfstrom* decision. The California case involved a plaintiff business owner whose employees and families were covered by an employer-sponsored group medical and life insurance policy issued by New York Life. When Mr. Elfstrom's daughter reached majority, he instructed his secretary to ensure that she remained covered. The secretary sent New York Life an application card which falsely represented that the daughter was a full time employee when in fact she had returned to school. *Elfstrom*, 67 Cal.2d at 506-507. The

---

[21] Indeed, *Turrill* was decided by the same Fifth Circuit panel, *see Dedeaux v. Pilot Life Ins. Co.*, 770 F.2d 1311 (5th Cir. 1985), which this Court reversed two years later in *Pilot Life*.

daughter died shortly thereafter. New York Life denied payment because she was ineligible under the insurance policy's written terms.

In deciding this case, the California Supreme Court realized it had encountered the "relatively new social device" of "group insurance." Determined to compel payment, it held that the secretary was acting as New York Life's agent, reasoning that an employer which performs administrative functions in support of a group insurance plan must act under the insurance company's direction, and that the secretary's knowledge could be imputed to the insurer. 67 Cal.2d at 505-506, 510, 512, 514. Under the *Elstrom* doctrine, the insurer possesses all control over a group insurance plan, with the employer-sponsor becoming a mere functionary. This proposition is the exact reverse of ERISA's carefully-crafted statutory scheme that was enacted seven years later and now governs this case.

B. *The* Elfstrom *Rule Plainly Relates To An ERISA Plan.*

ERISA preempts the *Elfstrom* rule because it "relates to" an ERISA plan within the meaning of § 514(a) inasmuch as it has a "reference to" or "connection with" the plan. *Shaw*, 463 U.S. at 96-97.

Elfstrom plainly satisfies the "reference to" test because it purports to regulate the ERISA plan's operation and payment of benefits. Here, the Plan explicitly dictates the nature and scope of the agency relationship between MAC and UNUM. It provides that the employer is the Plan Administrator and not the agent of UNUM. Pet. App. at 44a. Application of *Elfstrom* reads this provision out of the Plan and substitutes a different and conflicting provision based on California law. Indeed, Ward is attempting to use state law to assert the timely, oral "filing" of an ERISA claim with MAC, and to bind the Plan to such "filing" and obtain benefits that are specifically barred by the Plan's written terms. The state law thus has a direct and immediate "reference to" an

ERISA plan and is preempted pursuant to § 514(a). *See Pilot Life*, 481 U.S. at 47-48; *District of Columbia v. The Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992); *Dillingham*, 117 S.Ct. at 841.

Elfstrom also satisfies the "reference to" test because it depends on the *existence* of an ERISA plan. *Ingersoll-Rand*, 498 U.S. at 140 (ERISA preempts where the "existence of a . . . plan is a critical factor in establishing liability under state law"). *Elfstrom's* "reference to" ERISA plans is obvious because it regulates plan administration and benefit payment where an employer has established a group insurance plan to provide welfare benefits and serves as Plan Administrator. This type of private sector plan will, in almost all instances, be an ERISA plan. ERISA § 3(1); *see Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*). Because *Elfstrom* applies almost exclusively to ERISA plans, preemption arises due to the fact that "the existence of ERISA plans is essential to the law's operation." *Ingersoll-Rand*, 498 U.S. at 140. In *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1488-1489 (7th Cir. 1996), the Seventh Circuit held that § 514(a) preempted a state agency law suit to hold a plan responsible for a medical provider's conduct in denying plan benefits. The Court found that the agency argument was based on the plan's existence, triggering preemption under *Ingersoll-Rand*.

Elfstrom also plainly has a "connection with" ERISA plans, and is preempted, because, as shown below, it directly clashes with ERISA's statutory structure including its fiduciary responsibility rules and plan administration provisions. *See Travelers*, 514 U.S. at 656; *Dillingham*, 117 S.Ct. at 838; *FMC Corp.*, 498 U.S. at 59; *Jass*, 88 F.3d at 1488-1489 (ERISA preempts agency rule because it has " 'the effect of regulating the structure or administration of ERISA plans' ") (citation omitted). Even if the *Elfstrom* rule did not clash with ERISA, § 514(a) would still preempt the rule. For example,

in *Howard v. Gleason Corp.*, 901 F.2d 1154 (2d Cir. 1990), the Second Circuit considered a New York statute that required employers to provide specified notice to terminated employees about insurance conversion privileges. The Court held that ERISA preempts the state law because it "purports to impose on an employer obligations of the same general type as those imposed by ERISA." *Id.* at 1157. Rejecting the argument that the New York law should escape preemption because it "does not conflict with any express provision of ERISA in the sense that both laws could be enforced side by side," the Second Circuit held that ERISA preempts the state statute because it "intrudes into an area that Congress intended to be fully occupied by federal statute." *Id.* at 1158. *See also Jass,* 88 F.3d at 1493.

In cases where the direct relationship between the plan and the state law is not so immediately obvious as the one here, this Court has held that whether the law has a "connection with" the plan and thus is preempted by ERISA § 514(a) should be based on " 'the objectives of the ERISA statute . . . as well as to the nature of the effect of the state law on ERISA plans.' " *Dillingham,* 117 S.Ct. at 838 (citation omitted). The *Elfstrom* rule frustrates ERISA's goals by imposing different regulations from state to state, and by permitting claimants to obtain "benefits in excess of what plan administrators intended to provide, and in excess of what the plan provided to employees in other States." *Travelers,* 514 U.S. at 660, 656-657, 658.

C. *The* Elfstrom *Rule Directly Conflicts With ERISA's Substantive Terms Governing Plan Administration.*

Conflicts preemption bars the *Elfstrom* holding that an employer administering an insured employee benefit plan acts as the agent of the insurer. The holding is directly contrary to ERISA's statutory scheme. Specifically, an employer establishing an employee benefit plan is not only the "Plan Sponsor," but also the "Plan Administrator" absent designation of another party as

administrator. ERISA § 3(16)(A), (B). Consequently, the employer itself possesses the *sole* authority to "control and manage the operation and administration of the plan" under ERISA § 402(a), except to the extent it has delegated fiduciary obligations to another party pursuant to § 402(b)(2). 29 U.S.C. § 1102(a), (b); *see* ERISA § 3(21)(A). Further, ERISA requires the Plan Administrator to act "solely in the interests of the participants and beneficiaries," ERISA § 404(a); thus, the employer could not also act as an "agent" of any other principal, as *Elfstrom* dictates, and cause the plan to be administered contrary to its written terms in violation of § 404(a)(1)(D).

Federal supremacy principles also bar *Elfstrom's* superimposition of state agency law onto the federal regulatory scheme because the state law directly conflicts with the Act's specific fiduciary and co-fiduciary responsibility rules in §§ 409(a) and 405(a)(1), (3). 29 U.S.C. §§ 1109(a), 1105(a)(1), (3).

ERISA imposes *personal* liability on a fiduciary for its *own* breach of any of its "responsibilities, obligations, or duties" under ERISA. ERISA § 409(a); *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. at 139. *See also Perkins v. Time Ins. Co.,* 898 F.2d 470 (5th Cir. 1990) (under ERISA, personal liability of another party cannot be imputed to insurer under agency law theory). The Ninth Circuit, however, permitted Ward to proceed on a state law agency theory that UNUM, as a "principal" and co-fiduciary, was personally liable for any ERISA violation by MAC in failing to ensure that he timely filed a written notice and proof of claim with UNUM. MAC gave Ward the certificate of coverage which described the Plan's claims procedures, and he attended a number of meetings at which he reviewed the Plan. ERISA did not require MAC, as the Plan Administrator, to do still more for its CEO. ERISA's reporting and disclosure rules "may not be a foolproof informational scheme, although it is *quite thorough.* Either way, *it is the scheme*

that Congress devised." *Curtiss-Wright*, 514 U.S. at 84 (emphasis added).

Even if, as did not occur, MAC had violated ERISA by failing to seek Ward out to give him further, specialized information about claims-filing, the Ninth Circuit still erred in permitting him to use state law agency doctrine to impute such a violation to UNUM as a co-fiduciary. ERISA explicitly places the reporting and disclosure obligations *personally* on the Plan Administrator, §§ 405 (b)(1), 502(c), and no other party can be held liable for such a violation, as the Ninth Circuit has recognized. *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 300 (9th Cir. 1989). *See also McKinsey v. Sentry Ins. Co.*, 986 F.2d 401 (10th Cir. 1993). Additionally, ERISA's co-fiduciary liability rules impose liability only where the co-fiduciary has *actual knowledge* of a breach by its co-fiduciary but fails to act. ERISA § 405(a)(1), (3).[22] Within the Plan's time limit for filing written notice and proof of claim, UNUM had no knowledge that Ward claimed to be "disabled" or had purportedly so advised his employer.

The *Elfstrom* rule adopted by the Ninth Circuit overturns ERISA's statutory scheme for fiduciary and co-fiduciary responsibility and civil enforcement.[23]

---

[22] H.R. Rep. No. 93-1280, 304 (1994) (actual knowledge is required; there is no duty of investigation); *Davison v. Cook*, 567 F. Supp. 225, 237 (E.D. Va. 1983), *aff'd mem.*, 734 F.2d 10 (4th Cir.), *cert. denied*, 469 U.S. 899 (1984); *Justice v. Bankers Trust Co., Inc.*, 607 F. Supp. 527, 536 (D.C. Ala. 1985).

[23] Even if Ward could argue that ERISA fiduciary duties were somehow breached, ERISA would not provide relief. ERISA does *not* authorize a suit for breach of fiduciary duties in order to obtain individual monetary relief, *Russell*, 473 U.S. at 146-147, *Varity Corp. v. Howe*, 516 U.S. 489 (1996), especially in violation of the plan's written terms. ERISA § 502(a)(1)(B), (a)(2). Even if a participant sues for individualized equitable relief under § 502(a)(3), this section only permits a suit to "*enforce* . . . the terms of the plan" or the "provisions" of ERISA itself (emphasis added).

D. *The* Elfstrom *Rule Directly Clashes With ERISA's Exclusive Civil Enforcement Mechanism.*

The exclusivity of ERISA's civil enforcement scheme also compels preemption of the *Elfstrom* rule.

By statute, all ERISA fiduciaries must strictly follow the plan's written terms, ERISA § 404(a)(1)(D), including the fiduciary conducting the review procedure under § 503; correspondingly, a participant may only file suit to recover benefits "*due* . . . under the *terms* of [the] plan," ERISA § 502(a)(1)(B) (emphasis added). This closely-interlocked structure for fiduciary responsibility and civil enforcement is "the exclusive remedy for rights guaranteed under ERISA." *Ingersoll-Rand*, 498 U.S. at 144.

In an attempt to suggest otherwise, the Ninth Circuit opined: "[N]or does *Elfstrom* create an 'alternate enforcement mechanism' for ERISA plan obligations beyond those set forth in the statute." Pet. App. at 21a-22a. This conclusion is 180 degrees off course. The decision below provides the clearest possible example of an "alternate enforcement mechanism" triggering ERISA preemption. It permits a state law rule to require consideration of plan benefits precisely when a claim denial is mandated by the plan itself, ERISA's fiduciary responsibility rules and its exclusive civil enforcement scheme. As the Seventh Circuit recognized in *Jass, supra*, ERISA preempts the state agency law because it is a mechanism for seeking *benefits* not permitted by the plan documents. 88 F.3d at 1488-1489.

IV. Unless Reversed, The Ninth Circuit Decision Will Seriously Disrupt The Administration Of The Nation's Employee Benefit Plan System.

Unless reversed, the Ninth Circuit decision will cause serious disruptions in the administration of the nation's employee benefit plan system, to the ultimate detriment of the plans and their participants.

Congress built ERISA on the premise the employers should be *encouraged* to provide a voluntary, financially stable system of employee benefit plans. *See* ERISA § 2(a). Throughout its consideration of ERISA, Congress "was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted." 120 Cong. Rec. 29,953 (1974) (remarks of Sen. Nelson). Congress recognized that if costs were made overly-burdensome, plans would neither be established nor expanded, and an extensive private retirement system would not develop. *Id.* at 29,944-45 (1974) (remarks of Sen. Long).

If the Ninth Circuit decision is allowed to stand, the very economic disincentives Congress hoped to avoid in ERISA will become a reality. By exposing ERISA plans to conflicting state common-law regulation, the costs of funding employee benefit plans will increase significantly. Litigation costs will increase as will the cost of claims investigations, thus invalidating pricing assumptions. These costs will fall not only on employers and the insurance industry, but also on the very individuals ERISA was established to benefit—plan participants. Faced with the increased cost of providing coverage, employers may decide to reduce benefits, or to terminate their plans. Employees, on the other hand, may find the health or pension protection that they have come to rely on significantly cut back or denied altogether. This can hardly be what Congress envisioned when it established a federal regulatory scheme to foster "a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business." *Taylor v. Bakery & Confectionery Union & Industry International Welfare Fund*, 455 F.Supp. 816, 820 (E.D.N.C. 1978).

Specifically, the Ninth Circuit's new ERISA preemption standard is so narrow and restricted that it reopens a

door closed by *Pilot Life* to suits against the plan based on virtually any state law claim arising out of a benefit denial. Participants in California will now be able to sue for benefits under circumstances where benefits are not payable under the same plan in Texas, Florida or dozens of other states. This will only encourage further costly litigation to pry open other aspects of employee benefit plan administration, all contrary to Congress' goal of regulating ERISA plans through a "uniform body" of federal "benefits law." *Travelers*, 514 U.S. at 645.

Similarly, because the Ninth Circuit has abandoned the benchmark "business of insurance" standard, namely, the transfer of risk of loss, the Circuit's new standard for construing ERISA's saving clause is so broad and indeterminate that it will arguably include virtually any common-law rule of general application that can be identified with the insurance industry. This list is ever-expanding. For example, California has numerous rules dealing with interpretation of insurance contracts, *e.g.*, *Delgado v. Heritage Life Ins. Co.*, 157 Cal.App.3d 262, 271 (1984) (exclusions and limitations are "strictly construed against the insurer and liberally interpreted in favor of the insured"); *Willden v. Washington Nat'l Ins. Co.*, 18 Cal.3d 631, 635 (1976) ("process of nature rule" relates disability date to the time of the accident). California law now also makes an insurer "forfeit" certain policy rights, *Sarchett v. Blue Cross of Calif.*, 43 Cal.3d 1 (1987) (violation of covenant of good faith and fair dealing caused forfeiture of policy's arbitration clause), and has special limitations on rescission of insurance contracts, *e.g.*, California Insurance Code, § 10350.2. None of these laws "spreads risk," but might be, arguably at least under the Ninth Circuit's expansive standard, preserved by the saving clause even though they directly clash with ERISA's statutory scheme for plan administration.

To allow common-law rules in the fifty states to encroach on ERISA's exclusive framework for fiduciary

obligations and plan administration—and to "alter" the plan's written terms, and to permit a suit for benefits contrary to those terms—completely disrupts any possibility of the "nationally uniform administration" of plans under federal law, a principal congressional goal. *Travelers*, 514 U.S. at 657. In some states, such as Illinois and Michigan, plans will be able to continue to enforce written time limits for submitting claims, as permitted in ERISA; in other states, such as California, they will not be able to do so. In some states, plan fiduciaries may continue to follow uniform federal law in discharging their obligations; in other states, such as California, they will face conflicting federal-state directives on the most essential plan administration feature, the payment of benefits. All of this conflict in law will create vast confusion and difficulty as well as increased expense in ERISA plan administration.

The adverse consequences of the Ninth Circuit decision, moreover, will extend far beyond plan administration within the Ninth Circuit. ERISA provides for nationwide service of process, and permits a suit to be filed in any district where the plan is administered, the breach of fiduciary duty took place, or a defendant resides or may be found. ERISA § 502(e)(2), 29 U.S.C. § 1132 (e)(2); *see, e.g., Varsic v. United States Dist. Ct.*, 607 F.2d 245, 248 (9th Cir. 1979). Sponsors need to be able to design insured and self-funded pension and welfare plans without fear that their written terms will be overturned in one state or another through an erroneous application of ERISA's preemption and saving clauses. Depriving employers of the discretion over plan design will only provide a strong disincentive to establish such plans in the first place. *See, e.g., Health v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995).

Unless this Court reverses the Ninth Circuit decision, it will be impossible for ERISA plan administrators and fiduciaries to predict or even identify the " 'uniform body' "

of federal benefits law, which was a "basic thrust" of ERISA. *Travelers*, 514 U.S. at 656-657. It will also be impossible for them to administer their plans both in compliance with the plans' written terms and the Ninth Circuit decision. The administrators and fiduciaries cannot know whether to deny a claim on the basis of a clear plan limit, or to accept the claim under state law without regard to the terms of their plan and thus breach an ERISA fiduciary duty. They cannot even know which opposing sets of federal and state laws to apply to determine those questions.

The Ninth Circuit decision also will create an anomalous, confusing split between the administration of self-funded plans which would not be subject to the universe of common-law rules such as notice-prejudice and *Elfstrom*, insured plans which would be, and self-funded plans with stop-loss coverage where a claim presumably would not be until it reached the stop-loss attachment point. Indeed, many plans include not only a number of benefits, some self-funded and some insured, but also a single time limit for filing all claims. Adding to this confusion, many states have rejected the notice-prejudice rule, and it varies considerably across the land, *see* 13A George J. Couch, *Couch Cyclopedia of Insurance Law*, § 49.49 at 276-277 (2 ed. 1982); similarly, state agency law doctrines vary from jurisdiction to jurisdiction. All of this practical uncertainty coupled with the striking differences in law from state to state will create strong financial incentives for employers to cut back or eliminate benefits, directly contrary to ERISA's objectives. ERISA § 2(a), (b); *Pilot Life*, 481 U.S. at 54; *FMC Corp.*, 498 U.S. at 60.

The illogical and haphazard results produced by the Ninth Circuit decision are disruptive to the nation's employee benefit plan system, and the exact reverse of what Congress intended. This Court should reverse the judgment below to restore the preeminence of ERISA's

statutory scheme over employee benefit plan regulation and to give effect to the congressional purposes underlying ERISA.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed and the case remanded with instructions to affirm the summary judgment in favor of the Plan and UNUM.

Respectfully submitted,

Of Counsel:
BARBARA H. FUREY
Assistant General Counsel
BRIAN G. KANNER
Senior Litigation Counsel
TAMARRA T. RENNICK
Litigation Counsel
UNUM LIFE INSURANCE
COMPANY OF AMERICA
2211 Congress Street
Portland, ME 04122
(207) 770-2211

LESLEY C. GREEN
RUSSELL G. PETTI
BANNAN, GREEN & FRANK LLP
555 South Flower Street
44th Floor
Los Angeles, CA 90017
(213) 362-1177

DAVID L. BACON
Counsel of Record
BENJAMIN I. DELANCY
CHARLES M. DYKE
THELEN REID & PRIEST LLP
333 So. Grand Avenue
34th Floor
Los Angeles, CA 90071
(213) 621-9800
Attorneys for Petitioner
UNUM Life Insurance
Company of America

December 2, 1998